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District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho	
<div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;">           JAN 20 2017         </div>	
By _____	Clerk
_____	Deputy Clerk

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

City of Pocatello, )  
 )  
 ) Petitioners )  
 )  
 )  
 vs. )  
 )  
 )  
 )  
 ) GARY SPACKMAN in his official capacity )  
 ) As Director of the Idaho Department of Water )  
 ) Resources; and the IDAHO DEPARTMENT )  
 ) OF WATER RESOURCES, )  
 )  
 ) Respondents. )  
 )

Case No. CV-01-17-00067  
**CITY OF POCATELLO'S  
 MEMORANDUM IN SUPPORT OF  
 MOTION TO DETERMINE  
 JURISDICTION**

City of Pocatello ("Pocatello") submits this Memorandum in Support of its Motion to Determine Jurisdiction of this Court over Pocatello's appeal of the November 2, 2016 Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area, *In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area*, Docket No. AA-

GWMA-2016-001 (“GWMA Order”), by the Director of the Idaho Department of Water Resources (“Director” or “Department”). Pocatello requests that the Court find that the timely filing of Pocatello’s appeal properly created jurisdiction of the captioned matter in this Court.

### INTRODUCTION

On January 13, 2017 the Sun Valley Company (“Sun Valley”) filed a Motion to Determine Jurisdiction in Case No. CV-01-16-23185, Ada County Court, requesting the Court determine that it has jurisdiction to consider Sun Valley’s appeal of the GWMA Order. Although the substance of the appeals differs somewhat, the procedure leading up to the filing of the appeals is the same and, with the following additions, Pocatello adopts Sun Valley’s procedural history described in its January 13, 2017 *Memorandum in Support of Motion to Determine Jurisdiction* in Case No. CV-01-16-23185 before this Court. In addition to Sun Valley’s procedural history, Pocatello notes:

- On November 16, 2016, Pocatello filed a Petition for Reconsideration of the Director’s GWMA Order establishing a ground water management area (“GWMA”) in the vicinity of the Eastern Snake Plain Aquifer (“ESPA”). Exhibit D to Pocatello’s Notice of Appeal and Petition for Judicial Review, Jan. 3 2017 (“Petition”), on file with the Court. Pocatello requested the Director withdraw the GWMA Order until, at minimum, “he is prepared to issue one final order comprising the GWMA designation, the GWMA goals, and a plan containing operational restrictions to be imposed on ground water users.” Exhibit D to Pocatello’s Petition. at 4.
- The Director did not issue an order in response, and Pocatello’s Petition for Reconsideration was denied by operation of law pursuant to Idaho Code section 67-5246(5)(b).

- On December 20, 2016 the Coalition of Cities filed a Petition for Clarification, (attached as Exhibit E to Pocatello's Petition) seeking to clarify whether the Director's decision to grant a hearing was based on the parties' petitions for reconsideration and request for one final order on the GWMA, or whether the Director had denied the petitions. The Director issued a Response to Petition for Clarification on December 30, 2016 (attached as Exhibit F to Pocatello's Petition) in which the Director did not clarify the basis for the grant of a hearing but instead simply stated that in the Department's view, the GWMA Order is not ripe for judicial review because the parties had not exhausted their administrative remedies "until the Director issues a final order following the hearing requested by SVC." Exhibit F to Pocatello's Petition at 3.

On January 3, 2017, Pocatello timely filed a Notice of Appeal and Petition for Judicial Review in the above-captioned proceeding.

## ARGUMENT

### **I. The GWMA Order is subject to judicial review.**

The GWMA Order is a final, effective order and this Court has jurisdiction to consider Pocatello's appeal. I.C. § 67-5246(5); IDAPA 37.01.01.740.01; GWMA Order, "Explanatory Information to Accompany a Final Order" (designating the order as "final" and subject to judicial review).

Pocatello filed a Petition for Reconsideration; however, the Director did not issue an order on Pocatello's Petition for Reconsideration. Pursuant to I.C. § 67-5246(5), a petition for reconsideration "is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition." Accordingly, the Petition for Reconsideration was denied, and the GWMA Order became final and subject to judicial review.

Under similar circumstances, the Idaho Supreme Court determined that a petition for reconsideration is deemed denied if the Director does not “issue a written decision disposing of the petition for reconsideration” within 21 days. *A&B Irrigation Dist. v. Idaho Dep’t of Water Res.* (“*A&B*”), 154 Idaho 652, 656, 301 P.3d 1270, 1274 (2012). In *A&B*, the A&B Irrigation District filed a petition for reconsideration of an administrative order issued by the Department, the Department failed to decide the merits of the petition within twenty-one days, and A&B appealed. The Department later issued an amended order, despite the pending appeal, arguing that it had “accepted” the petition for reconsideration, therefore disposing it. *Id.* at 655, 301 P.3d at 1273. The Idaho Supreme Court rejected this analysis and found the original order was a final order subject to appeal because it was denied by operation section 67-5246(5). The Court concluded that “IDWR no longer had jurisdiction in the matter, and the [amended order], is a nullity.” *Id.* at 652, 301 P.3d at 1270.

Just as the Director lost jurisdiction in *A&B* after it failed to decide A&B’s petition for reconsideration, the Director has lost jurisdiction to in the GWMA matter. Importantly, any hearing held by the Director would result in an amended GWMA Order—something that, under *A&B*, the Director does not have jurisdiction to do.

This lack of jurisdiction is similar to the constraints on a trial court after an appeal is filed: “I.A.R. 13 provides that once an appeal is filed the trial court loses jurisdiction to take any further action in the case.” *Syth v. Parke*, 121 Idaho 156, 157, 823 P.2d 760, 761, *on reh’g*, 121 Idaho 162, 823 P.2d 766 (1991). “Once a notice of appeal has been perfected the district court is divested of jurisdiction and the proceedings are stayed during the pendency of the appeal. There are exceptions to this general rule, and they are specifically enumerated in Rule 13.” *H & V Engineering, Inc. v. Idaho State Bd. of Prof’l Engineers & Land Surveyors*, 113 Idaho 646, 648,

747 P.2d 55, 57 (1987) (citations omitted); *see also* Sun Valley's *Memorandum in Support of Motion to Determine Jurisdiction* at 5-6.

Pocatello's appeal is timely filed and, as detailed in its Petition, based on various infirmities in the GWMA Order, including the Department's failure to define a reasonably safe water supply for the ESPA or the nature and extent of regulation under the Department's new administrative paradigm. "The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal" of an appeal. *City of Eagle v. Idaho Dep't of Water Res.*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011). The Director argued in its Response to the Coalition of Cities' Petition for Clarification that the GWMA Order is not final for purposes of judicial review because of Sun Valley's request for a hearing. However, the Director's views on the jurisdiction of this Court regarding petitions for judicial review are not binding on this Court. *Id.*

## **II. Pocatello has met the exhaustion requirement**

Pocatello has exhausted its administrative remedies pursuant to I.C. § 67-5271. Pocatello sought reconsideration of the Director's final order, and while the Director did not rule on Pocatello's petition for reconsideration, as detailed above, the petition was denied as a matter of law. Further, the Director did not grant (nor did Pocatello request) a hearing for purposes of resolving the issues raised in Pocatello's Petition for Reconsideration. In light of this, Pocatello's remedies at the agency level are exhausted.

However, even if the Court determines the GWMA Order is not "final", I.C. § 67-5271(2) provides: "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Here, the GWMA Order seeks to modify the regulation of Pocatello's property rights without regard to constitutional principles of beneficial use, and without disclosing the

“reasonably safe supply” of ground water the agency has determined to achieve through its new regulatory paradigm. Pocatello’s Petition reflects the numerous legal infirmities in the GWMA Order; these legal issues cannot be resolved by hearing, including the failure of the GWMA Order to designate a “reasonably safe supply” . I.C. § 67-5271(2).

**CONCLUSION**

For the foregoing reasons, Pocatello requests that this Court find that it has jurisdiction to review Pocatello’s appeal of the GWMA Order and that the Director does not have jurisdiction to hold a hearing or otherwise proceed in the administrative matter until this appeal is resolved.

Respectfully submitted this 20th day of January, 2016.

CITY OF POCATELLO ATTORNEY’S OFFICE

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of January, 2017 a true and correct copy of the foregoing **CITY OF POCA TELLO'S MEMORANDUM IN SUPPORT OF MOTION TO DETERMINE JURISDICTION** in **Docket No. CV-01-17-000067** was served on the following by the method indicated below:



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